

**Upper Tribunal
(Immigration and
Asylum Chamber)
Appeal Number:
OA/19415/2013**



THE IMMIGRATION ACTS

**Heard at Field House
On 6 November 2015**

**Decision and Reasons
Promulgated
On 18 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SONGGOM LIMBU

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N O'Brien (counsel) instructed by M KK Gill,
solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge McMahon promulgated on 03 October 2014, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 28 April 1991 and is a national of Nepal. He applied for entry clearance as the dependent son of his parents, who are present and settled in the UK.

4. On 17 October 2013 the Secretary of State refused the Appellant's application, finding that the appellant could not satisfy the requirements of paragraph E-ECDR.2.1 of appendix FM to the immigration rules. The respondent does not accept that the appellant requires long term personal care as a result of age, illness or disability.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge McMahon ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 12 February 2015 Judge Hollingworth gave permission to appeal stating inter alia

"At paragraph 18(iii) the Judge has stated that there is no evidence as to the appellant's ability in the English language and there was no evidence as to the likelihood of him being financially independent upon entry to the UK. It is unclear whether the sponsor was asked relevant questions in the context of either of these aspects of the application of section 117. Where there is no legal representation and given the date of the insertion of the new part 5A and the application of section 117 it is arguable that the Judge should have made enquiry into the question of the extent of the available evidence."

7. On 11 May 2015 the appellant's solicitors sought leave to amend the grounds of appeal under rule 5(3)(c) of The Tribunal Procedure (Upper Tribunal) Rules 2008. The appellant's solicitor argued that the sponsor (the appellant's father), served in the Gurkha brigade of the British army between 1982 and 1995. His last period of service was in the UK from 1993 until discharge in 1995. It is now argued that the appellant should benefit from the respondent's policy permitting the dependent children of former Ghurkas over the age of 18 to come to the UK (IDI chapter 15. Section 2A Annex K)

8. Mr Walker for the respondent told me that there was no opposition to the application to amend the grounds of appeal. I therefore allow the grounds of appeal to be amended so that there is now an additional ground of appeal which proceeds on the basis that there was evidence available which was known to the respondent and would have been before the First-tier Tribunal if either the respondent had considered every aspect of this case before the hearing, or if the Judge had made enquiry at the hearing, when the sponsor and the appellant were without legal representation.

The Hearing

9. (a) Mr O'Brien, counsel for the appellant, moved his application to adduce further evidence under rule 15 (2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008. He adopted the terms of his skeleton argument and emphasised that at [14] the Judge found that family life within the meaning of article 8 ECHR existed between the appellant and his UK-based family. He told me that the Judge made a material error of law in his assessment of proportionality. Mr O'Brien conceded that the appellant cannot meet the terms of the immigration rules but argued that the appellant's article 8 rights should be considered out-with the immigration rules. He noted that at [17] the Judge sets out the relevant parts of section 117B of the 2002 Act, but that at [18] the Judge's conclusions are flawed because the Judge did not make enquiry about the appellant's ability in the English language and (he argued) the Judge misdirected himself at [18(iii)] and in so doing incorrectly concluded that the appellant is not financially independent.

(b) Mr O'Brien told me that the Judge restricted his article 8 proportionality assessment to a consideration of the factors set out in section 117B of the 2002 Act when there were other relevant factors which should have formed part of the balancing exercise. In addition the Judge's findings that there was no evidence of the appellant's ability in the English language nor the likelihood of financial independence on entry to the UK were not findings which were open to the Judge, because no enquiry had been made of the unrepresented sponsor about those matters. He argued that there had been procedural unfairness leading the Judge to those conclusions. In any event it was submitted that the Judge had misunderstood the term "*financially independent*" as it is used in section 117B of the 2002 Act.

(c) In the alternative, Mr O'Brien argued that because section 117 of the 2002 Act did not come into force until nine months after the date of the decision, its provisions have no bearing on the need for immigration control at the date of decision; in any event the Judge should have had regard to the prevailing statutory regime at the date of decision and then to the change in the law between the date of the decision and the date of appeal hearing, and applied those factors to the proportionality exercise.

(d) The additional ground of appeal relates to an argument that the appellant has suffered an historic injustice. Evidence is now produced that the appellant's father (who is the appellant's sponsor) served in the Gurkha brigade of the British Army between 1982 and 1995. It is said that he would have settled in the UK in 1995 and brought the appellant (who was three years of age at that time) to the UK then. Mr O'Brien relied on the cases of Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) and Gurung and others [2013] EWCA Civ 8.

10. Mr Walker for the respondent told me that the circumstances of this case should have made it obvious to anybody looking at the case that

there was a real likelihood that the appellant's father had served in the Gurkha brigade, because of the date & place of birth of the appellant's father, and because the appellant's mother was born in Hong Kong. He told me that he could see force in the submissions that had been made by Mr O'Brien, and although he could not concede the appeal, the decision contains a material error of law.

Analysis

11. At [9] and [10] the Judge considers the evidence and finds that the sponsor is a reliable and credible witness. At [12] the Judge finds that the appellant cannot fulfil the requirements of the immigration rules. At [13] the Judge correctly considers article 8 out-with the immigration rules, and at [14] the Judge finds that family life within the meaning of article 8 exists between the appellant and his family in the UK. At [15] the Judge finds that the respondent's decision is an interference with family life, and, at [16] the Judge correctly focuses his attention on the question of proportionality.

12. At [17] the Judge refers himself to section 117B of the Nationality Immigration and Asylum Act 2002. It is at [18] that the Judge sets out his conclusions. At [18(iii)] the Judge complains that there is no evidence that the appellant submitted about his ability in the English language nor is there evidence of his financial independence. It is there that the Judge makes a material error of law. It is beyond dispute that neither the appellant nor his father had the benefit of legal representation before the First-tier Tribunal. The Judge correctly records that the appellant was assisted by a McKenzie friend. It is common ground that the Judge did not seek evidence relating to either the appellant's ability in the English language or to the appellant's financial independence.

13. The findings at [18(iii)] clearly set out matters which were determinative of the appeal, but those findings relate to matters which were not put to the sponsor for comment. There has therefore been such procedural unfairness that a material error of law is created.

14. When the determination is read as a whole as it is apparent that the Judge's entire focus on the question of proportionality was dominated by the provision of section 117B of the 2002. The Judge does not consider any other relevant factors but limits consideration to section 117B - as if the provisions contained there encompass every consideration relevant to determining whether or not interference with an article 8 right is proportionate to the pursuit of the legitimate aim. That is an incorrect approach and is a material error of law.

15. As the decision contains material errors of law, I set it aside. There is sufficient evidence before me to enable me to remake the decision.

Findings of Fact

16. The appellant is a Nepalese citizen born on 28 April 1991. The appellant's mother was born in Hong Kong and holds a British passport. The appellant's mother, father and sister all live in the UK. The appellant's father was born in 1963. He is a Nepalese citizen. Between 1982 and 1995 he served in the Gurkha brigade of the British army. The final two years of his service to 1995 were carried out in the UK.

17. After the sponsor was discharged from the British army, the appellant's parents moved to Hong Kong. The appellant and his sister remained in Nepal. If the appellant's parents had been able to move to the UK they would have done so in 1995, and would have brought the appellant and his sister to join them in the UK.

18. On 15 August 2007 the appellant's mother was issued with a British passport. She returned to Nepal to look after the appellant and his sister. At that time the appellant was in full-time education. In November 2008 the appellant's father entered the UK. He has lived in the UK since then. On 18 March 2013 the appellant's father was granted indefinite leave to remain in the UK.

19. On 25th October 2010 the appellant's mother and sister entered the UK and joined the appellant's father. The appellant's parents and his sister have remained in the UK as one family unit since then.

20. The appellant did not apply to come to the UK in 2008 because he was a student, studying in India. The appellant applied to enter the UK in 2010 as the child of a British citizen (his mother) and his application was refused because his British citizen mother was with him in Nepal until October 2010.

21. The appellant's education in India finished in 2009. He then returned to Nepal and started studying for a degree. He completed his degree in 2013. In 2015 the appellant travelled to Malaysia to work on an internship programme. The appellant's education has been provided in the English language.

22. The appellant's parents support the appellant. They have paid for his maintenance, accommodation and education throughout the appellant's life and continue to do so. Although the appellant has not been able to meet his parents since 2010, they remain in close contact, regularly telephoning and Internet video calling each other. If the appellant is allowed to come to the UK, it is his intention to live with his parents and his sister. The appellant's parents can provide adequate maintenance and accommodation. There is no real likelihood that the appellant will claim public funds.

Analysis

23. In Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) it was held that (i) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments; (ii) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware); (iii) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight; (iv) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the SSHD/ ECO consist solely of the public interest in maintaining a firm immigration policy; (v) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (a) their family life engages Article 8(1); and (b) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance.

24. Counsel for the appellant told me that the appellant cannot fulfil the requirements of the immigration rules. This case turns on an assessment of the proportionality of the respondent's decision in terms of article 8 ECHR. It is accepted that family life within the meaning of article 8 ECHR exists & that the respondent's decision interferes with the right to respect for family life; it is accepted that interference is in accordance with the law and is in pursuit of the legitimate aim.

25. In R (on the application of Esther Eburn Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 - MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to

look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

26. Section 117 is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

27. This case concerns article 8 family life, so that subsections (4) (5) & (6) of s.117B of the 2002 Act are irrelevant. The documentary evidence indicates that the appellant speaks English, and that his parents support him. The appellant's parents are in a financially comfortable position and continue their support. There are therefore more factors in section 117B which weigh in the appellant's favour than count against the appellant. In addition the appellant's father was deprived of the opportunity to settle in UK. Had he done so it is likely that a significant part of the appellant's childhood would have been spent in the UK.

28. The respondent's position is simply that entry clearance is refused solely on public interest grounds. Section 117B(1) of the 2002 Act tells me that effective immigration control is in the public interest.

29. When I weigh those factors against one another and apply the guidelines in the case of Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) (*When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate*) I come to the conclusion that the respondent's decision is a disproportionate interference with the right to respect for family life within the meaning of article 8 ECHR.

Decision

30. The decision of the First-tier tribunal is tainted by a material error of law.

31. I set aside the decision & substitute the following decision.

32. I dismiss the appeal under the Immigration Rules.

33. The appeal is allowed on article 8 ECHR grounds.

Signed

Date 11 November 2015

Deputy Upper Tribunal Judge Doyle